

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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| KAYLA KOETHER, in her individual capacity as the Democratic Nominee for the Iowa House of Representatives District 55, Plaintiff, vs. PAUL PATE in his official capacity as Iowa Secretary of State; BENJAMIN STEINES in his official capacity as County Auditor for Winneshiek County, Iowa, Defendants. | CASE NO.: EQCE083821 ORDER ON PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION |
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This matter came before the Court on the Plaintiff's Motion for Temporary Injunction. Due to the time sensitivity of the matter, an emergency hearing was set on November 30, 2008. Present at the time of the hearing was Plaintiff's Counsel, Shayla McCormally and Kolby Warren. Present for Defendant Paul Pate was Matthew Gannon. Defendant Benjamin Steines had been served, but counsel representing Steines had not yet appeared.

FACTUAL BACKGROUND

This case arises from the November 6, 2018 election for Iowa House District 55. The Plaintiff in this matter, Kayla Koether, is the Democratic candidate for that seat. Her opponent is Republican Michael Bergan. The election was extremely close. Of the nearly 14,000 ballots cast, only nine votes separated Koether and Bergan, with Bergan in the lead.

At question, in this case, are 33 absentee ballots received by the Winneshiek County Auditor on or after the election date of November 6, 2018. These absentee ballots were not counted by the Winneshiek County Absentee and Special Voters Precinct Board because they did not contain the postmark indicating when they had been placed in the federal mail system.

Iowa Code § 50.24(2) states that a canvassing board shall “contact the chairperson of the special precinct board before adjourning to include in the canvas...any absentee ballots which were received after the polls closed in accordance with section 53.17 and which were canvassed by the special precinct board after election day.” Furthermore, Iowa Code § 53.17(2) states:

[I]n order for the ballot to be counted, the return envelope must be received in the Commissioner’s office before the polls close on election day or be clearly postmarked by an officially authorized Postal Service or bear an intelligent mail barcode traceable to a date of entry into the federal mail system not later than the day before the election and received by the commission or not later than noon on the Monday following the election.

Iowa Code § 53.17(2)(2018).

The 33 ballots in question were received by the Winneshiek County Auditor via the United States Postal Service on or after Election Day, November 6, 2018, but prior to the canvas of the votes. As previously stated, they were not counted because they did not contain a stamp mark indicating the date in which they were placed in the mail. It appears to be undisputed that the return ballots were too thick to be run through a stamp canceling postmark machine at the Postal Service. As a result, they did not receive what is traditionally considered a postmark. All of the votes in question, however, contain what appears to be a barcode printed by the mail service on the lower portion of the envelope. The parties, at this juncture, dispute the nature of this mark. The Plaintiff believes that the mark is an “intelligent mail barcode” as referred to in Iowa Code § 53.17(2). Counsel for the Defendant Secretary of State, however, contends that an intelligent mail barcode is a code affixed by a sender of a piece of mail and is used to gain a discount in mailing.

Critical to the issue of a temporary injunction, the Plaintiff contends that if the barcodes on the envelopes are “intelligent mail barcodes”, they must be read immediately. Specifically, the Plaintiff has reason to believe that intelligent mail barcodes are reused every 30 to 45 days, making it difficult or impossible to read them after that period. As such, if the barcodes were

printed on the envelopes prior to November 6, 2018, their reuse could be eminent, resulting in the loss of any data concerning when the envelopes were placed in the mail.

Before the Court are two specific issues for injunctive relief. First, the Plaintiff requests an injunction delaying the certification of the election in Iowa House District 55. Second, the Plaintiff seeks an injunction compelling the Auditor of Winneshiek County to have the 33 ballots in question evaluated by the Postal Service to secure any information contained and associated with the barcodes printed on the ballot envelopes. In considering the evidence presented by the parties, the Court DENIES IN PART AND GRANTS IN PART THE PLAINTIFF'S MOTION.

STATEMENT OF LAW

The party requesting a temporary injunction has the burden to establish a factual basis for its issuance. *Kleiman v. Charles City Police Department*, 373 NW2d 90, 95 (Iowa 1985). A temporary injunction is a preventative remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation. *Id.* Affidavits may be considered in determining whether a temporary injunction may be allowed. *Id.* To authorize the issuance of a writ of temporary injunction, plaintiff must not only plead facts which, if proved, would entitle them to injunctive relief, but must offer evidence which would prove their probable right thereto on final hearing and of probable injury in the interim. *Id.* at 96.

The issuance or refusal to issue a temporary injunction rests largely in the sound discretion of the trial court. *Id.* The issuance or refusal of a temporary injunction is a delicate matter -- an exercise of judicial power which requires great caution, deliberation and sound discretion. *Id.*

Before a temporary injunction is granted, it should appear that the plaintiff is entitled to the relief demanded and that such relief, or some part thereof, includes restraining the commission or continuance of some act which would produce great or irreparable injury to the

plaintiff. Rule Iowa R. Civ. P. 1.1502(1). An injunction is appropriate only when the party seeking it has no adequate remedy at law. An injunction “should be granted with caution and only when clearly required to avoid irreparable damage.” A court of equity will not grant injunctive relief “unless it appears that there is an invasion or threatened invasion of a right and that substantial injury will result to the party whose rights are so invaded, or such injury is reasonably to be apprehended.” Before granting an injunction, the court should carefully weigh the relative hardship which would be suffered by the enjoined party upon awarded injunctive relief. *Matlock v. Weets*, 531 NW2d 118, 122 (Iowa 1995).

The party seeking an injunction has the burden to show not only a violation of their rights but also that they will suffer substantial damages unless one is granted. The test for issuing an injunction is whether the facts in the case show a necessity for intervention of equity in order to protect rights cognizable in equity. *Id.* at 123.

Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other litigants; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C L systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). In balancing the equities, no single factor is determinative. The likelihood that the plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, when the movant has raised a substantial question, and the equities are otherwise strongly in his favor, the showing of success on the merits can be less. *Id.*

A court of equity can and in a proper case will award mandatory injunctive relief which will compel some affirmative act, thus going beyond mere restraint. *Iowa Nat. Res. Council v. Van Zee*, 158 N.W.2d 111, 115 (1968) citing *Falcon v. Boyer*, 142 N.W. 427 (Iowa 1913). Although courts look upon the latter with disfavor and such injunctions are granted with caution in cases of great necessity, they may be proper. *Id.*

At the outset, the Court would like to emphasize it is only addressing the Plaintiff's Motion for a Temporary Injunction here. It is not in any way addressing their further request for a permanent injunction or the merits of the case, which will both be addressed at some point in the future. The grant or denial of a temporary injunction is not a decision on the merits of the request for a permanent injunction, is not an adjudication on the substantive claims, and does not deprive either party of a trial on the merits. See *Bd. of Ed. of Kimballton Indep. Sch. Dist. v. Bd. of Ed. of Audubon County*, 151 N.W.2d 465, 468 (1967) (finding "action in granting an application for a temporary injunction, or in denying its dissolution on motion does not deprive the parties of the right to a trial on the merits...nor is it an adjudication for or against" the claims). Even though temporary relief may be properly granted or denied, the opposite conclusion may be had on the permanent injunction after the parties have had an opportunity to present their entire proof and arguments thereon, "because a decision on the merits of a request for a permanent injunction will in many cases be based on different facts and arguments than a decision on a request for a temporary injunction." *Iowa State Dep't of Health v. Hertko*, 282 N.W.2d 744, 753 (Iowa 1979) (citation omitted).

ANALYSIS

INJUNCTION OF ELECTION CERTIFICATION

The Plaintiff first requests that the Court issue an injunction delaying the certification of the election in House District 55. The Plaintiff contends that this certification will take place soon after a November 3, 2018 meeting of the Executive Committee sitting as the State Board of Canvassers. After examining the applicable law on the certification of elections and the potential for an election contest, the Court concludes that the Plaintiff will not suffer irreparable harm if this Court does not issue an injunction.

A movant seeking a preliminary injunction may show irreparable harm by showing that there is no adequate remedy at law. *Reg Seneca, LLC v. Harden*, 938 F. Supp. 2d 852, 860 (S.D. Iowa 2013). Where the movant has an adequate legal remedy, a preliminary injunction will not issue. *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1025 (8th Cir.1992).

In this case, there is an adequate legal remedy available to the Plaintiff which would allow her to delay the certification of the election. Iowa Code § 57 sets forth the general provisions for contesting an election. It states that an election may be contested for “any error in any board of canvassers and counting the votes, or in declaring the results of the election, if the error would affect the result.” Iowa Code § 57(1)(2018). Furthermore, Iowa Code § 57.2 sets forth the manner in which a certification of the election can be withheld if there is a contest of the election. It states in part:

[I]f notice of a contest of the election of an officer is filed before the certificate of election is delivered to the incumbent...the certificate or duplicate abstract and declaration shall be withheld until the determination of the contest. If the certificate of election or duplicate abstract and declaration have been issued, the Commissioner shall send the persons or political subdivisions affected by the notice of contest a statement advising them that the election is being contested and that the certificate or duplicate abstract and the declaration are not valid until the election contest is resolved.

Iowa Code § 57.2 (2018).

Under the applicable provisions, the Plaintiff can delay the certification of the election by filing a Notice of Contest. By doing so, the election will not be valid until the contest is resolved. As such, the Plaintiff has an adequate remedy at law, and this Court should not issue a temporary injunction. The Plaintiff's Motion for Injunction delaying the certification of the election is therefore DENIED.

INJUNCTION OF THE READING OF INTELLIGENT MAIL BARCODES

The Plaintiff also requests that the Court issue an injunction directing the Auditor of Winneshiek County to have the 33 ballots in question evaluated by the Postal Service to secure any information contained and associated with the barcodes printed on the ballot envelopes, prior to any reuse of the codes. After examining the facts and law on this issue, the Court concludes that an injunction should be issued.

As stated previously, in considering an injunction a court should consider (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other litigants; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc.*, 640 F.2d at 113.

It is clear to the Court that the barcodes on the ballot envelopes contain some type of meaningful information that can be read by the Postal Service. The Court concludes that it is possible, if not probable, that the codes printed on the ballot envelopes are considered by the Postal Service as "intelligent mail barcodes" that were placed there by the Service and used to track the mail. At this juncture, the Court need not determine if these barcodes are what is referred to as "intelligent mail barcodes" in Iowa Code § 53.17(2). At this juncture, the Court only needs to determine it is possible that they are the barcodes referred to in the statute, and that information concerning when the ballots were placed in the mail could be lost if not evaluated by the Postal Service within the next several days. Here the harm to the Plaintiff is great if the

information is lost. Furthermore, there is no real injury to the Defendants in having the barcodes evaluated. While the Court cannot state if the Plaintiff will succeed on the merits of her claim, the equities weigh in her favor, and she need not necessarily show a great likelihood of prevailing on the merits. *Dataphase Systems, Inc.*, 640 F.2d at 113. Finally, there is no doubt that there is a great public interest in the outcome of the evaluation of the ballots. Failure to read the barcodes could result in ballots that were validly cast being ignored. The Plaintiff's Motion for Injunction directing the Auditor of Winneshiek County to have the ballots in question evaluated by the Postal Service is therefore GRANTED.

The parties should note that the Court's order that follows is limited to the preservation of evidence. The Court will set a separate hearing to determine if further relief is warranted. Prior to that hearing, all parties will have an opportunity to be heard and provide evidence on the interpretation of the statute and whether this Court has proper jurisdiction over the matter.

ORDER

The Court, therefore, orders and directs the Auditor of Winneshiek County, Iowa as follows:

1. Collect and hold securely the 33 absentee ballots in question that were received by the Auditor after the November 6, 2018, election but prior to the completion of the canvas. If the ballots have not yet been opened, they should remain sealed.
2. Place on each ballot envelope an exhibit sticker and number the ballots 1 through 33.
3. Coordinate with the United States Postal Service the evaluation and, if possible, the reading of the barcodes found on the ballot envelopes to determine the date that each individual ballot envelope was placed in the U.S. Mail. This evaluation by the Postal Service should be done no later than close of business December 5, 2018.

4. Provide the Court and parties with the information gained from the United States Postal Service. Specifically, the Auditor should provide the Court and parties with the date each individual ballot envelope was placed in the U.S. Mail. Each ballot envelope should be identified by the number assigned to it. This information should be provided to the Court and parties no later than December 7, 2018.
5. The Auditor should keep the 33 ballots securely, unopened, and marked with exhibit stickers, until further direction by this Court.
6. As stated previously, the Auditor of Winneshiek County, Iowa, was served prior to the hearing on this matter but had not yet appeared. As such, the Court will allow the Auditor until close of business December 3, 2018, to file a formal objection to the order as set forth above if he deems it necessary.

IT IS SO ORDERED



State of Iowa Courts

Type: OTHER ORDER

| Case Number | Case Title |
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| EQCE083821 | KAYLA KOETHER V PAUL PATE AND BENJAMIN STEINES |

So Ordered

A handwritten signature in black ink, appearing to be 'Scott J. Beattie', written over a horizontal line.

Scott J. Beattie, District Court Judge,
Fifth Judicial District of Iowa